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No. 05-5992

In the Supreme Court of the United States

JACOB ZEDNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner can challenge delay resulting from a continuance that he requested and that the Speedy Trial Act of 1974 authorizes.

2. Whether the district court committed reversible error under the Speedy Trial Act by not beginning petitioner's trial at a time when petitioner was incompetent to stand trial.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 189-220) is reported at 401 F.3d 36. The memorandum and order of the district court (J.A. 128-136) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2005. A petition for rehearing was denied on May 24, 2005 (J.A. 221). The petition for a writ of certiorari was filed on August 22, 2005, and was granted on January 6, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case involves challenges under the Speedy Trial Act to two periods of delay that occurred before petitioner's trial: (1) delay from January 31, 1997, to May 2, 1997, in response to petitioner's request for a continuance for trial preparation; and (2) delay from August 23, 2000, to March 7, 2001, during which time petitioner was incompetent to stand trial. The district court rejected petitioner's challenges, and the court of appeals affirmed.

1. The Speedy Trial Act of 1974 (STA or the Act), 18 U.S.C. 3161 *et seq.*, requires a defendant's trial to begin within 70 days of his indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Automatically excluded from the computation of the 70 days are periods of delay resulting from the defendant's mental incompetence, 18 U.S.C. 3161(h)(4); the prompt disposition of pretrial motions, 18 U.S.C. 3161(h)(1)(F); interlocutory appeals, 18 U.S.C. 3161(h)(1)(E); and various other matters, 18 U.S.C. 3161(h). In addition, any "period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government" is excluded "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," and the court "set[] forth, in the record of the case, either orally or in writing, its reasons for [that] finding." 18 U.S.C. 3161(h)(8)(A).

The Act provides that if a defendant is not brought to trial within the 70-day period, "the information or

indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending upon the district court's weighing of various factors. *Ibid.*; *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988). "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal." 18 U.S.C. 3162(a)(2).

2. In March 1996, petitioner attempted to open accounts at several financial institutions with a counterfeit $10 million bond. One of the institutions called the Secret Service, which arrested petitioner and seized three additional counterfeit bonds from him, each in the amount of $10 million. J.A. 191.

On April 16, 1996, petitioner was indicted on seven counts of attempting to defraud a financial institution, in violation of 18 U.S.C. 1344, and one count of knowingly possessing counterfeit obligations of the United States, in violation of 18 U.S.C. 472. J.A. 3, 66-69. On June 7, 1996, the district court held a status conference at which petitioner's counsel failed to appear. J.A. 4. The court scheduled another status conference for June 21, 1996, and entered an order excluding the resulting delay from the speedy trial clock pursuant to 18 U.S.C. 3161(h)(8)(A). J.A. 4. When petitioner and his counsel failed to appear at that conference, the district court scheduled another one for June 26, 1996, and again entered an order excluding the resulting delay from the STA clock. *Ibid.*

At the June 26, 1996, status conference, petitioner requested time to review documents in Washington, D.C. The parties agreed, and the court found, that the case was complex. See 18 U.S.C. 3161(h)(8)(B)(ii). The court granted a continuance until September 6, 1996,

and excluded the resulting delay from the STA clock. J.A. 5-6. On September 6, 1996, the case was again adjourned, and the court entered another order of excludable delay until November 8, 1996. J.A. 6-7.

At the November 8, 1996, status conference, petitioner's counsel moved for an adjournment and said that he would "waiv[e] speedy trial" until January 1997. J.A. 71; see J.A. 7. The court informed petitioner that to obtain a continuance of that length he would have to waive his speedy trial rights "for all time" because the court had lengthy trials pending and was concerned that petitioner would invoke his speedy trial rights at a time when the court could not hold a trial. J.A. 71. The court explained that in a previous case, a defendant had tried to manipulate the court in that manner. J.A. 71-72.

Petitioner's counsel assured the court, "We'[ll] waive for all time. That will not be a problem. That will not be an issue in this case." J.A. 72. Addressing petitioner personally, the court then advised petitioner at length of his speedy trial rights. J.A. 72-77. The court stated that it was prepared to "start your trial right away," but that petitioner's counsel had requested a continuance until the end of January. J.A. 73. Petitioner stated that he understood his speedy trial rights and desired to waive them. Petitioner also represented that he was not coerced or threatened into waiving those rights, and that he was 42 years old and had completed two years of college. J.A. 75-76.

Petitioner signed a written waiver of his speedy trial rights, and the court found that he had knowingly and voluntarily waived those rights. J.A. 77, 79. The court adjourned the proceedings until January 31, 1997, and entered an order excluding the resulting delay from the STA clock because of defense counsel's need for addi-

tional preparation time. See J.A. 7, 77; C.A. App. 46-49. For the duration of the case, however, the court issued no further orders excluding time from the speedy trial clock. J.A. 192.

On January 31, 1997, the government reported ready for trial, but petitioner's counsel replied that he needed more time to research the authenticity of the bonds. J.A. 8, 81-82. Counsel explained that he had already spent "a lot of time" contacting a "lot of people," but needed "one more adjournment." J.A. 82. Petitioner's counsel also stressed that "we've waived * * * not only the speedy trial time but our right to bring a speedy trial motion." J.A. 81; see J.A. 85 ("My client has waived the speedy trial time.").

After inquiring into the need for further investigation, and determining that petitioner had requested excessive delay, the court set trial for May 5, 1997—approximately six months before petitioner requested. J.A. 82-86; see J.A. 8. In response to petitioner's reliance on waiver, the court stated that "[y]ou don't have to do it twice because once you've waived you can't get it back." J.A. 81. But the court also noted that in May, the case would be a "year old. That's enough for a criminal case." J.A. 85.

On May 2, 1997, petitioner's counsel asked to be relieved because petitioner wanted to present the frivolous defense that the bonds were genuine. Petitioner consented to a psychiatric examination, and in August 1997 he was found competent to stand trial. In the meantime, the court substituted counsel for petitioner. J.A. 192-193.

In September 1997, petitioner discharged his new attorney and represented himself. From 1997 to 1998, petitioner filed numerous motions and subpoenas di-

rected at high-ranking government officials and fictitious organizations, which caused the court to question his competency. On October 14, 1998, the day trial was scheduled to begin, the court found that petitioner was not competent to stand trial and ordered him committed for hospitalization and treatment pursuant to 18 U.S.C. 4241(d). On interlocutory appeal, the Second Circuit vacated and remanded for a new competency hearing. *United States* v. *Zedner*, 193 F.3d 562 (1999). J.A. 193-194.

On remand, the parties jointly requested that a competency hearing be held on July 10, 2000. At that hearing, Dr. Sanford Drob, the director of psychological assessment at Bellevue Hospital and the senior psychologist on the Bellevue Prison Ward, testified that petitioner understood the charges against him and could rationally talk to his attorney with one major exception: how to proceed with his defense. C.A. App. 222, 238-239. Dr. Drob concluded that petitioner's behavior was caused by a "mental illness," and explained that petitioner should be deemed competent if he were willing to present a realistic defense, but not if he persisted in the belief that the bonds were genuine. *Id.* at 240, 242-243.

In light of Dr. Drob's testimony, the court asked the parties for briefing. On August 4, 2000, petitioner's counsel filed a brief in support of petitioner's competency. The government filed a brief taking the contrary view on August 11, 2000, and petitioner filed a pro se brief on August 23, 2000. J.A. 194-195. The court did not act on the competency issue for some time.[1]

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[1] In November 2000, petitioner's counsel became unavailable to try the case because of complications from her pregnancy. One month later, the prosecutor and defense counsel discussed the case and agreed that it did not require immediate attention. J.A. 195.

On March 7, 2001, petitioner moved to dismiss the indictment on statutory and constitutional speedy trial grounds. On March 21, 2001, the court denied that motion on the grounds that the case was complex and petitioner had waived his speedy trial rights. J.A. 128-136. The court also found petitioner incompetent to stand trial. J.A. 129-135. On interlocutory appeal, the Second Circuit affirmed the finding of incompetency. *United States* v. *Zedner*, 29 F. App'x 711 (2002).

In May 2002, petitioner entered a federal medical facility for examination. Near the end of his commitment, petitioner obtained a 90-day extension of his stay. The institution released petitioner on August 27, 2002, and concluded that he was delusional but competent to stand trial. The district court accepted that conclusion and scheduled trial for April 7, 2003, at which time petitioner was convicted on six counts of attempting to defraud a financial institution. J.A. 196.[2]

3. The court of appeals affirmed the convictions, but remanded for resentencing in light of *United States* v. *Booker*, 543 U.S. 220 (2005). J.A. 189-220. Petitioner argued, among other things, that he was denied the right to a speedy trial under the STA based on two periods of delay: January 31 to May 2, 1997, when trial was postponed at the request of petitioner; and August 23, 2000, until March 7, 2001, when the district court had before it serious questions about petitioner's competency. See J.A. 197-198.

The court of appeals held that petitioner waived his objection to the first of the disputed periods, during which time the trial was postponed at petitioner's re-

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[2] The evidence at trial and sentencing showed that in addition to the fraud at issue here, petitioner had committed a variety of other credit card and mortgage frauds. C.A. App. 85-87, 650, 653.

quest. J.A. 199-204. After recognizing that defendants may not routinely waive their speedy trial rights, J.A. 200, the court held that "when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request," J.A. 203.

The court of appeals explained that after petitioner waived his speedy trial rights, the district court "did not enter any orders of exclusion" from the STA's 70-day period "based on its assumption that the waiver 'for all time' removed all speedy trial issues from the case." J.A. 199. "[T]here can be no doubt," the court of appeals explained, "that the district court could have properly excluded [the relevant] period of time based on the ends of justice" because of "the complexity of the case and [petitioner's] reasonable need for additional preparations." J.A. 203-204. Thus, the court held, petitioner "cannot establish a Speedy Trial Act violation based on the grant of the delay he requested." *Ibid.* The court of appeals emphasized, however, that "district courts contemplating adjournment of trial are far better advised to make prospective 'ends of justice' findings under § 3161(h)(8), where appropriate, rather than to rely on defendant waivers. Reliance on waivers 'for all time' seems particularly inadvisable." J.A. 204 n.3.

As to the August 2000-March 2001 period, the court of appeals determined that petitioner "could not have been tried in this period, for two reasons": his counsel was "unavailable for trial by reason of complications resulting from her pregnancy," and petitioner "was not competent to stand trial." J.A. 204-205.

With respect to the second of those reasons, the court explained that the district court had found peti-

tioner to be incompetent and the court of appeals had affirmed that decision. J.A. 205. The STA excludes "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." 18 U.S.C. 3161(h)(4). The court of appeals noted that "[i]t might be argued" that "the delay did not *result from* the fact that [petitioner] was incompetent" to stand trial because the district court did not make a specific finding that the delay resulted from the incompetency. J.A. 205. In the court of appeals' view, "[t]he question would then be whether a defendant is entitled to have his conviction voided and the indictment dismissed by reason of the court's failure to begin trial at a time when the court could not have begun trial because the defendant was incompetent, as well as because the defendant's counsel was unavailable for trial." *Ibid.*

On that question, the court concluded that "[t]he failure to start trial when [petitioner] could not have been tried was, at worst, a harmless, technical error." J.A. 205. After recognizing that many STA violations are not harmless, the court concluded that "failure to consider the harmlessness of certain errors under the [STA] can result in perverse outcomes" and is inconsistent with 28 U.S.C. 2111 and Federal Rule of Criminal Procedure 52(a), which instruct appellate courts to disregard errors that do not affect substantial rights. J.A. 207, 208. Here, the court of appeals concluded that "the error, if any, was harmless" because petitioner could not have been tried during the time period in question and petitioner had also "failed to put forth any convincing argument that this delay prejudiced him at his trial." J.A. 208-209.

In rejecting petitioner's constitutional speedy-trial challenge, the court of appeals noted that "[m]ost of the

delay between indictment and trial was caused by [petitioner's] own requests for delay, his attempts to subpoena prominent persons and fictitious entities, the need to determine his competency to stand trial, [petitioner's] incompetency for a time, and two interlocutory appeals taken by him." J.A. 210. The court also found "no indication that [petitioner's] ability to mount an effective defense was seriously impaired. Indeed, much of the pretrial delay resulted from the wide latitude the district court granted [petitioner] to prepare his defense." J.A. 211.

SUMMARY OF ARGUMENT

I. Petitioner cannot challenge the delay he sought from January until May 1997. The STA manifests an intent to limit defendants' ability to waive the Act's protections, but it does not displace the distinct doctrine of judicial estoppel. That doctrine provides that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (citation omitted).

Here, petitioner's express waiver induced the district court to grant a continuance without making an express ends-of-justice finding in circumstances that make manifest that the court could and almost certainly would have made an explicit finding but for petitioner's litigation conduct. In that situation, basic principles of judicial estoppel preclude petitioner from enjoying the benefit of the continuance, but then challenging the lack of a finding. That is particularly true here, where the court effectively did make an ends-of-justice determination when it considered the relevant factors under the

STA and reduced the length of the requested continuance.

Nothing in the STA manifests an intent to override the general applicability of judicial estoppel principles. While a broad waiver rule could permit courts and defendants to evade the STA's protections, the Act does not expressly speak to the narrower question of judicial estoppel. And Congress's basic intent—that time should be excluded from the STA clock only if a court granted a limited continuance after determining that it served the ends of justice—is upheld where, as here, a court granted a continuance after analyzing the relevant factors and the court could and almost certainly would have made an express ends-of-justice finding but for petitioner's conduct. A contrary rule could thwart Congress's intent to speed criminal trials by giving defendants every incentive to delay in hopes of manufacturing an STA violation.

Alternatively, this Court should remand so that the district court can consider whether to enter an express ends-of-justice finding on the record. That remedy would be appropriate in this case because the court actually considered the appropriate factors in granting the continuance, and it almost certainly would have entered an express finding on the record but for petitioner's waiver.

II. A. The time that elapsed between August 2000 and March 2001 is excluded from the STA clock by 18 U.S.C. 3161(h)(4), which covers "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." The district court found that petitioner was incompetent during the relevant time period, and the court of appeals affirmed that determination on interlocutory appeal.

Petitioner's contention that if the court had found him incompetent sooner, he would have been treated and tried sooner, is legally irrelevant. The incompetency exclusion automatically covers the full duration of a defendant's incompetency. The STA does not invite a reviewing court to undertake a highly speculative inquiry into whether prompter action by the district court could have returned the defendant to competency any sooner. And it is far from clear that an earlier incompetency determination would have led to an earlier trial, because too many other variables affect a defendant's return to competency and the scheduling of trial.

The court of appeals stated that "[i]t might be argued" that the district court erred by not "mak[ing] a record that the delay resulted from the defendant's incompetence." J.A. 205. Such an argument would lack merit, because the record shows that petitioner was incompetent, and that is all the Act requires. Unlike the ends-of-justice exclusion, the incompetency exclusion is automatic, and therefore does not require any additional findings.

B. Even if the district court erred in not making a further record on the incompetency exclusion, the error would be harmless. Although petitioner argues (Pet. Br. 33) that "a violation of the 70-day time limit for bringing a defendant to trial is [not] subject to harmless-error analysis," that is not the potential violation identified by the court of appeals. Instead, the court of appeals focused on the potential inadequacy of the district court's findings on the causal relationship between the period of delay and petitioner's incompetence. Nothing in the Act manifests an intent to displace normal harmless-error principles with respect to *that* type of error. In addition, it would make little

sense to render judgment in petitioner's favor based on a perceived inadequacy with respect to findings on whether the delay resulted from petitioner's incompetence. Instead, the appropriate remedy for any such deficiency would be to vacate and remand for the district court to make the appropriate findings on that issue.

ARGUMENT

PETITIONER IS NOT ENTITLED TO RELIEF UNDER THE SPEEDY TRIAL ACT FOR PERIODS OF AUTHORIZED DELAY THAT HE INDUCED OR THAT OCCURRED WHILE HE WAS INCOMPETENT

This case involves two alleged defects in the record made to justify periods of authorized delay under the Speedy Trial Act. First, petitioner argues (Pet. Br. 18-33) that the time between January and May 1997 is not excluded from the STA clock because the district court did not make an express ends-of-justice finding excluding that time. Second, the court of appeals stated that the time between August 2000 and March 2001 might not be excluded because the district court allegedly did not make a record that the relevant delay resulted from petitioner's incompetency. J.A. 205. Both periods of delay were authorized by the Act, and petitioner is not entitled to dismissal based on alleged procedural defects that he induced or that occurred when he in fact could not stand trial because he was incompetent. At most, the only remedy to which petitioner would be entitled is a remand to allow the district court to determine whether to enter the necessary findings.

I. A DEFENDANT CANNOT CHALLENGE DELAY THAT HE SOUGHT AND THE SPEEDY TRIAL ACT AUTHORIZES

Petitioner challenges (Pet. Br. 18-33) the delay he caused by securing a continuance from January until May 1997. In seeking that continuance, petitioner repeatedly waived his speedy trial rights, and thereby induced the district court to grant the continuance without making express findings that would justify excluding the continuance from the STA clock—findings the court could and almost certainly would have made but for the waiver. Under those circumstances, petitioner cannot both reap the benefit of the continuance and challenge its validity under the STA.

A. Parties Are Presumptively Bound By Principles Of Waiver And Estoppel

"The most basic rights of criminal defendants are * * * subject to waiver." *Peretz* v. *United States*, 501 U.S. 923, 936 (1991). "[I]n the context of a broad array of constitutional and statutory provisions," this Court has "articulated a general rule that presumes the availability of waiver." *New York* v. *Hill*, 528 U.S. 110, 114 (2000) (quoting *United States* v. *Mezzanatto*, 513 U.S. 196, 200-201 (1995)). Because Congress legislates against that "background presumption that legal rights generally * * * are subject to waiver," the presumption can be overcome only by "some affirmative indication of Congress' intent to preclude waiver." *Mezzanatto*, 513 U.S. at 201, 203.

Speedy trial rights are not inherently different from other rights for waiver purposes. By requesting a continuance, a defendant can waive or forfeit the Sixth Amendment right to a speedy trial, *Barker* v. *Wingo*,

407 U.S. 514, 529 (1972), as well as the statutory right to a trial within the time limits of the Interstate Agreement on Detainers (IAD), *Hill*, 528 U.S. at 118. In *Hill*, this Court explained that although the IAD's time limits benefit society as well as defendants, "[w]e allow waiver of numerous constitutional protections for criminal defendants that also serve broader social interests." *Id.* at 117. "[O]ur adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation." *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 384 (1979); accord *Hill*, 528 U.S. at 117.[3]

Even apart from the presumption that parties are generally free to waive their rights, the distinct doctrine of judicial estoppel limits a party's ability to profit by strategically changing his litigation position. In order to "protect the integrity of the judicial process," this Court has long held that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire* v. *Maine*, 532 U.S. at 749 (quoting *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895); *Edwards* v. *Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)). "This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Ibid.* (quoting *Pegram* v. *Herdrich*, 530 U.S. 211, 227 n.8 (2000)).

The terms "waiver" and "estoppel" are sometimes used interchangeably, and both doctrines are presump-

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[3] The *Hill* Court noted that the IAD and the STA differ in some respects, and "express[ed] no view" on the waivability of the STA's time limits. 528 U.S. at 117 n.2.

tively applicable because they form part of the legal backdrop against which Congress legislates. Cf. *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 363 n.14 (1963) (referring to "the presumable applicability of familiar principles of waiver * * * and estoppel"). But the two doctrines serve different purposes and demand different legal showings. Waiver is the intentional relinquishment of a known right, while judicial estoppel is based on a party's adoption of inconsistent positions. See 31 C.J.S. *Estoppel and Waiver* § 70, at 440, 442-443 (1996); *New Hampshire* v. *Ramsey*, 366 F.3d 1, 16 (1st Cir. 2004); *Interactive Gift Express, Inc.* v. *Compuserve Inc.*, 256 F.3d 1323, 1345 (Fed. Cir. 2001). Estoppel is also a more discretionary and fact-based doctrine than waiver. See *New Hampshire* v. *Maine*, 532 U.S. at 750-751. Thus, even if a statute is interpreted to displace ordinary waiver principles, it may leave intact the context-specific protection of judicial integrity afforded by the doctrine of judicial estoppel.

B. The Speedy Trial Act Does Not Eliminate The Doctrine of Judicial Estoppel

The court of appeals correctly held that although the STA manifests an intent to limit the right to waive its speedy trial protections, it does not manifest an intent to preclude all waivers and estoppels. See J.A. 200.

The Act's limitation of the applicability of general waiver doctrine follows from its express provisions. The 70-day STA clock begins to run automatically upon a defendant's indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Automatically excluded from the 70 days are periods of delay resulting from various matters, such as a defendant's incompetency. 18 U.S.C. 3161(h). If a party de-

sires further delay, the Act provides a discretionary safety valve by excluding any "period of delay resulting from a continuance granted by any judge on his own motion *or at the request of the defendant or his counsel* or at the request of the attorney for the Government * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(8)(A) (emphasis added). The court must also "set[ ] forth, in the record of the case, either orally or in writing, its reasons for [that] finding." *Ibid.* And the Act provides an extensive, but non-exclusive list of facts for the court to consider, 18 U.S.C. 3161(h)(8)(B), as well a prohibition on granting an ends-of-justice continuance "because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government," 18 U.S.C. 3161(h)(8)(C).

Under those provisions, defendants cannot unilaterally waive the requirements of the Speedy Trial Act merely by seeking continuances. Instead, the speedy trial clock is tolled under 18 U.S.C. 3161(h)(8)(A) only if the district court finds that "the ends of justice served by [granting a continuance] outweigh the best interest of the public and the defendant in a speedy trial." That requirement for judicial approval of excludable delay, based on findings that the ends of justice outweigh speedy trial interests, furthers Congress's intent to protect society's interest in timely justice. See S. Rep. No. 1021, 93d Cong., 2d Sess. 6-8, 21 (1974); H.R. Rep. No. 1508, 93d Cong., 2d Sess. 15-16, 33-34 (1974). Because allowing unilateral waiver in all circumstances could circumvent the judicial-approval requirement and the

ends-of-justice standard it protects, the court of appeals correctly noted that the public interest in "the expeditious prosecution of criminal cases" would be "undermined if the provisions of the Act intended for the public benefit could be routinely nullified by a defendant's waiver." J.A. 200.

As the court of appeals also recognized, however, that does not mean that the Act never permits waiver or estoppel. See J.A. 203. Where, as here, a defendant's express waiver induced a district court to grant a continuance without making express ends-of-justice findings that the court could and almost certainly would have made but for the waiver, basic principles of judicial estoppel bar the defendant from challenging the validity of the continuance he requested. The integrity of the judicial process demands protection against a party's inducing a court not to make certain findings, and then seizing on that omission as a ground for reversal. Cf. *Johnson* v. *United States*, 318 U.S. 189, 201 (1943) (holding that defendant may not complain of error he invited). Nothing in the STA manifests an intent to preclude the application of ordinary estoppel principles in such circumstances.

C. Petitioner Is Estopped From Challenging The Delay He Requested From January Until May 1997

1. Ordinary principles of judicial estoppel preclude petitioner from challenging the validity of the continuance he requested

This Court has declined to "establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel" because "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general

formulation of principle." *New Hampshire* v. *Maine*, 532 U.S. at 750, 751 (quoting *Allen* v. *Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)). There are, however, three "factors" that "typically inform the decision whether to apply the doctrine in a particular case": (i) "a party's later position must be 'clearly inconsistent' with its earlier position"; (ii) "whether the party has succeeded in persuading a court to accept that party's earlier position"; and (iii) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-751.

a. Each of those factors is satisfied here. The inconsistency in petitioner's positions is plain. Petitioner's counsel assured the district court, "We'[ll] waive for all time. That will not be a problem. That will not be an issue in this case." J.A. 72. When he requested the continuance at issue here, petitioner's counsel argued that the continuance should be granted precisely because petitioner had waived his speedy trial rights, and also because he needed additional time to prepare. J.A. 81, 85. But now, petitioner both attacks the waiver on which he premised his request for the continuance and claims that his attorney did not need the additional preparation time. Pet. Br. 19-29, 32. The contradiction could hardly be more pronounced.

This is also a case where petitioner "succeeded in persuading a court to accept [his] earlier position" and "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire* v. *Maine*, 532 U.S. at 750-751. Until the continuance at issue, the district court made express ends-of-justice findings on several occasions when petitioner requested a continuance or petitioner's failure to

appear required one. See J.A. 4-7, 191-192. But when petitioner requested the continuance at issue here—and argued that the court should grant the continuance because he had waived his speedy trial rights—the court did not make express ends-of-justice findings because it "assum[ed] that the waiver 'for all time' removed all speedy trial issues from the case." J.A. 199. If the court had not relied on petitioner's waiver, no speedy-trial dispute over the relevant time period would have arisen. The court either would have denied the continuance, or—far more likely—would have granted the continuance and expressly made the relevant findings, as it had before.

As the court of appeals explained, "there can be no doubt that the district court could have properly excluded [the relevant] period of time based on the ends of justice" because of "the complexity of the case and [petitioner's] reasonable need for additional preparations." J.A. 203-204. Indeed, the district court undertook precisely that analysis before granting the continuance. J.A. 82-86. After petitioner's counsel explained that he had diligently prepared for trial by "tak[ing] a lot of time" to contact a "lot of people" regarding the authenticity of the bonds (J.A. 82), the district court inquired into whether further research was necessary (J.A. 83-84), and told counsel that "[y]ou better get some ex-Secret Service agent" to help with the investigation. J.A. 84. The court also stressed the importance of avoiding excessive delay, and based on that concern it granted only a limited continuance until May 5, 1997, even though petitioner had asked to delay trial until the end of the year. J.A. 85-86; see J.A. 82.

Thus, in assessing the appropriate length of the continuance, the court undertook an appropriate ends-of-

justice analysis by balancing the need for additional preparation against the interest in a speedier trial. See 18 U.S.C. 3161(h)(8)(A) and (B)(iv).[4] That analysis was independent of petitioner's waiver, as the court reduced petitioner's request by more than half a year, based on the court's independent assessment. J.A. 85-86. The court failed to embody that analysis in an express ends-of-justice finding only because, as the court of appeals explained, the district court believed that petitioner's waiver made such a finding unnecessary. J.A. 199.

The application of judicial estoppel is especially appropriate here in light of the facts that the court actually undertook the relevant balancing in granting petitioner's motion in part, and that the court failed to make an express ends-of-justice finding only because of petitioner's waiver. The court's error ultimately boils down to its failure to put the correct label—the ends of justice—on its determination that a limited continuance should be granted. Thus, estoppel in this case is premised critically on inducement of the court not to make an express ends-of-justice finding. That point both confirms the appropriateness of holding petitioner estopped and shows that estoppel is not just waiver by a different

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[4] When the STA was first enacted, Section 3161(h)(8) authorized continuances in only limited circumstances. Congress later concluded, however, that parties had not received sufficient time to prepare for trial. S. Rep. No. 212, 96th Cong., 1st Sess. 25-26, 34-35 (1979). Thus, Congress amended the Act in 1979 to provide that even in non-complex cases, courts can grant continuances if failure to do so "would deny counsel for the defendant * * * the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." 18 U.S.C. 3161(h)(8)(B)(iv). Cf. H.R. Rep. No. 390, 96th Cong., 1st Sess. 3 (1979) (describing the exclusion as being "broad"). The district court granted the continuance at issue here for precisely the reason specified in Section 3161(h)(8)(B)(iv). See J.A. 82-86.

name. Estoppel relies not only on the inconsistency in a party's positions, but also on the extent to which the litigant "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire* v. *Maine*, 532 U.S. at 750-751.

b. Although petitioner argues (Pet. Br. 32) that "it was the court, not the defense, that proposed the waiver," it was petitioner who first offered to waive the speedy trial right, and the court only required that any waiver be for all time, so that petitioner could not selectively waive and later insist on trial at a time when the court could not begin trial. J.A. 71. Moreover, that exchange occurred at an earlier point in the litigation. In requesting the continuance at issue here, petitioner's counsel, not the court, raised the waiver and relied on it twice in arguing that the continuance should be granted. J.A. 81, 85. In contrast, the court cautioned petitioner's counsel that a waiver could *not* justify excessive delay. J.A. 85.

Petitioner's contention (Pet. Br. 32-33) that he was not entitled to the continuance because he did not really need additional preparation time serves only to underscore the extremity of his position. Under petitioner's view, a defendant is apparently free to induce a court to grant a continuance based on his representations, but then seek dismissal on the ground that his own representations should not have been credited. Judicial estoppel prevents precisely such an about-face. See, *e.g.*, *Minnesota Mining & Mfg. Co.* v. *Chemque, Inc.*, 303 F.3d 1294, 1302-1303 (Fed. Cir. 2002), cert. dismissed, 538 U.S. 972 (2003); *Continental Ill. Corp.* v. *Commissioner*, 998 F.2d 513, 518 (7th Cir. 1993), cert. denied, 510 U.S. 1041 (1994); *Yniguez* v. *Arizona*, 939 F.2d 727, 738-739 (9th Cir. 1991); *Murray* v. *Silberstein*,

882 F.2d 61, 66-67 (3d Cir. 1989); *Hughes Masonry Co.* v. *Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 838-839 (7th Cir. 1981).

2. The Act does not manifest an intent to preclude the application of judicial estoppel in the circumstances of this case

The Act does not manifest an affirmative intent to preclude the application of such traditional estoppel principles in a way that would reward petitioner's extreme conduct. Although petitioner argues (Pet. Br. 19-29) that the text and purposes of the Act refute the district court's broad holding that defendants can waive their speedy trial rights for all time, the court of appeals did not endorse that proposition (J.A. 200), and the government does not rely on it. The provisions relied on by petitioner do not speak to the narrower question at issue here.

a. Petitioner argues (Pet. Br. 24-25) that because the Act includes two express waiver provisions, it should be read to preclude all other waivers. One of those provisions, 18 U.S.C. 3161(c)(2), governs the defendant's right to *delay* trial until 30 days after the defendant's first appearance through counsel, and therefore has no bearing on the right to a *speedy* trial within 70 days. The other provides that "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal." 18 U.S.C. 3162(a)(2). Under that provision, failure to seek dismissal in a timely manner constitutes an absolute waiver, as opposed to a forfeiture that could be reviewed for plain error. *United*

States v. *Morgan*, 384 F.3d 439, 442-443 (7th Cir. 2004).[5] It does not follow, however, that no other actions could give rise to any form of waiver or estoppel. To the contrary, the *Hill* Court held that a similar argument from "negative implication" was "not clear enough to constitute the 'affirmative indication' required to overcome the ordinary presumption that waiver is available." 528 U.S. at 116 (quoting *Mezzanatto*, 513 U.S. at 201).

Nor do any other provisions of the statute rule out the application of normal estoppel principles. Petitioner is correct (Pet. Br. 23-24, 26-27) that the 70-day period begins to run automatically, 18 U.S.C. 3161(c)(1), and that courts can toll that period by granting ends-of-justice continuances under 18 U.S.C. 3161(h)(8). Although those provisions counsel against a broad waiver rule, see pp. 16-18, *supra*, they do not indicate an intent to permit litigants to abuse the system by suspending ordinary estoppel principles. They do not expressly speak to that question, and the basic intent they convey—that time should be excluded from the STA clock only if a court granted a continuance after determining that it served the ends of justice—is served when a court granted a continuance after analyzing the relevant factors and the court could and almost certainly would have made an express ends-of-justice finding but for the waiver.

Nor do the Act's remedial provisions (relied on at Pet. Br. 22, 27) manifest an intent to displace estoppel principles. While the Act states that the defendant's conduct is one of several factors to consider in determin-

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[5] In general, waiver is the intentional relinquishment of a known right, while forfeiture is the failure to assert a right in a timely manner. *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004). Waiver extinguishes an error, but forfeited errors are ordinarily reviewable for plain error. *United States* v. *Olano*, 507 U.S. 725, 733-734 (1993).

ing whether the remedy for a violation of the 70-day period should be dismissal with or without prejudice, 18 U.S.C. 3162(a)(2), the Act does not thereby immunize defendants from any other consequences of their litigation tactics. Instead, it addresses a different question—whether any dismissal should be with or without prejudice—and articulates the various factors relevant to *that* inquiry.

b. In addition to relying on various textual provisions that do not expressly address the issue here, petitioner relies (Pet. Br. 15, 18-21) on Congress's general intent to promote the public's interest in speedy trials, an interest that is sometimes in conflict with a defendant's desire for delay. See *Barker*, 407 U.S. at 519; S. Rep. No. 1021, *supra*, at 14. In *Hill*, this Court rejected the contention that speedy trial rights under the IAD are not waivable because they protect society's interests as well as defendants'. The Court recognized that a right affecting the public interest may not be waived if the societal interest is "so central to the [statute] that it is part of the unalterable 'statutory policy.'" *Hill*, 528 U.S. at 117 (quoting *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 704 (1945)). But the Court explained that waiver of the IAD's speedy trial right does not contravene the unalterable statutory policy, in large part because "[i]n an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation." *Ibid.* (quoting *Gannett*, 443 U.S. at 383).

Petitioner argues (Pet. Br. 28-29) that the STA is different from the IAD because it serves the public interest in crime prevention, while the IAD applies to prisoners who are already incarcerated on other charges. See *Hill*, 528 U.S. at 117. Although that dis-

tinction may weigh in favor of holding that defendants may not routinely waive their STA rights merely by requesting continuances, it would make little sense to conclude that, in order to serve the purpose of preventing crime, a defendant should be able to seek dismissal based on a record defect he induced. It is particularly hard to fathom how the interest in crime prevention could be furthered by permitting a defendant to seek dismissal in the circumstances presented here, where petitioner sought a continuance that served the ends of justice and the court almost certainly would have made an express ends-of-justice finding but for the waiver.

Permitting such abuses of the judicial system would serve primarily to thwart the prosecution of criminals, an outcome that would hardly further the interest in crime prevention. Cf. *Barker*, 407 U.S. at 528-529 (holding that even though a defendant's failure to assert the constitutional right to a speedy trial in a timely manner does not waive the right, normal "waiver" principles apply to "delay * * * attributable to the defendant"); *United States* v. *Loud Hawk*, 474 U.S. 302, 314-315, 316-317 (1986) (holding that defendants are not ordinarily entitled to benefit from delay they caused).

Petitioner relies (Pet. Br. 25-26) on a portion of a 1979 Senate Report stating that "any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal * * *, is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial." S. Rep. No. 212, 96th Cong., 1st Sess. 29 (1979). Although one committee prepared that legislative history in connection with the

1979 amendments to the Act, Congress did not enact an anti-waiver provision as part of those amendments. Thus, the relevant portion of the Senate Report is best viewed as subsequent legislative history, which is a "'hazardous basis for inferring the intent of an earlier' Congress." *Jones* v. *United States*, 526 U.S. 227, 238 (1999) (quoting *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990)).

More fundamentally, reliance on estoppel is not inconsistent with the Senate Report's general rejection of waiver. It is one thing to conclude that, standing alone, a waiver should not be able to circumvent the Act's provision for ends-of-justice continuances. But it is quite another to permit a litigant, in any context, to induce a court not to make an express finding that the court readily could have made based on the facts before it, and then seek dismissal based on the absence of that finding.

Such a rule would impede Congress's intent to require sound trial management, see S. Rep. No. 1021, *supra*, at 10-12, and could thereby slow the pace of trials by encouraging defendants to delay in hopes of manufacturing STA violations. *United States* v. *Pringle*, 751 F.2d 419, 434 (1st Cir. 1984); see J.A 203; *United States* v. *Gambino*, 59 F.3d 353, 360 (2d Cir. 1995) ("The provisions of the Speedy Trial Act are not to be mistaken for the rules of a game where defense counsel's cunning strategy may effectively subvert Congress' goal of implementing sound trial management."), cert. denied, 517 U.S. 1187 (1996).[6]

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[6] Petitioner's reliance (Pet. Br. 15 n.12, 24) on guidelines issued by the Judicial Conference and a statement by the United States during the oral argument in *Mezzanatto*, *supra*, is likewise misplaced. Those statements address waiver in general, not the application of judicial

c. Although the courts of appeals have disagreed about the circumstances in which defendants should be held to their waivers, most courts to consider the question have agreed that while defendants may not ordinarily waive their speedy trial rights under the STA, they also "may not simultaneously use the Act as a sword and a shield" by disclaiming their waivers under at least some circumstances. *Pringle*, 751 F.2d at 434; see, *e.g.*, *Gambino*, 59 F.3d at 360 (collecting cases). The courts of appeals have articulated their standards in different ways, such as by holding that defendants cannot challenge delays to which they consented, *United States* v. *Kucik*, 909 F.2d 206, 210-211 (7th Cir. 1990), cert. denied, 498 U.S. 1070 (1991); cannot challenge continuances they requested if the continuances served the ends of justice, see, *e.g.*, *United States* v. *Keith*, 42 F.3d 234, 240 (4th Cir. 1994); or cannot challenge delays actually caused by their express waivers, see, *e.g.*, *Pringle*, 751 F.2d at 434-435.

Several courts of appeals have similarly held that defendants: may not "argue one legal theory or characterization of facts to obtain a continuance and then argue that the district court's ruling was erroneous" based on a contrary theory, *United States* v. *Willis*, 958 F.2d 60, 64 (5th Cir. 1992); see *United States* v. *Dunbar*, 357 F.3d 582, 596-597 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1099 (2005); *United States* v. *Sutter*, 340 F.3d 1022, 1033 (9th Cir. 2003), cert. denied, 541 U.S. 950 (2004); may not benefit from their own delaying

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estoppel in the circumstances presented here. See Tr. of Oral Arg., *United States* v. *Mezzanatto*, No. 93-1340, 1994 WL 757606, at *3 (Nov. 2, 1994); Committee on the Admin. of the Crim. Law of the Judicial Conference of the U.S., *Guidelines to the Admin. of the Speedy Trial Act of 1974, As Amended* 62-63 (1984).

tactics, *United States* v. *Tobin*, 155 F.3d 636, 642 (3d Cir. 1998) (Alito, J.), cert. denied, 525 U.S. 1171 (1999); *United States* v. *Culp*, 7 F.3d 613, 617 (7th Cir. 1993), cert. denied, 511 U.S. 1110 (1994); *United States* v. *Noone*, 913 F.2d 20, 28 (1st Cir. 1990), cert. denied, 500 U.S. 906 (1991); *United States* v. *Studnicka*, 777 F.2d 652, 658 (11th Cir. 1985); and may not otherwise "seek 'to turn the benefit [a defendant] accepted into an error that would undo his conviction,'" *United States* v. *Westbrook*, 119 F.3d 1176, 1188 (5th Cir. 1997) (citation omitted), cert. denied, 522 U.S. 1119 (1998); see *United States* v. *Baskin-Bey*, 45 F.3d 200, 204 (7th Cir.), cert. denied, 514 U.S. 1089 and 1121 (1995); cf. *United States* v. *Fields*, 39 F.3d 439, 443 (3d Cir. 1994) (Alito, J.) ("[D]efendants cannot be wholly free to abuse the system by requesting (h)(8) continuances and then argue that their convictions should be vacated because the continuances they acquiesced in were granted.") (citation omitted).

Although the courts of appeals, including the court below, have generally treated the issue as being one of waiver rather than estoppel, the terms are sometimes used interchangeably. See 31 C.J.S., *supra*, § 70, at 440; pp. 15-16, *supra*. Whichever terminology is used, the point is the same: the Act does not manifest an intent to permit defendants to challenge delays they requested if their express waivers induced the courts to grant the continuances without making express ends-of-justice findings the courts could and almost certainly would have made but for the waivers.[7]

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[7] As this Court has explained, judicial estoppel is a discretionary equitable doctrine that does not ordinarily lend itself to bright-line rules. See *New Hampshire* v. *Maine*, 532 U.S. at 750, 751; p. 18, *supra*. To resolve this case, the Court need not decide whether estoppel would

3. Alternatively, this Court should remand so that the district court can consider whether to make an express finding excluding the relevant period from the speedy trial time

Alternatively, this Court should remand to permit the district court to consider whether to enter an express ends-of-justice finding. Section 3161(h)(8) specifies that an excludable continuance must be based on a finding that the ends of justice warrant the continuance, and the reasons for that finding must be set forth in the record. 18 U.S.C. 3161(h)(8)(A). Such a finding need not, however, be entered on the record at the same time a continuance is granted. Instead, the requirements of the Act are satisfied if the court actually engaged in the required ends-of-justice analysis before granting the continuance, and entered an express finding on the record later. *E.g.*, *United States* v. *Bieganowski*, 313 F.3d 264, 283 (5th Cir. 2002), cert. denied, 538 U.S. 1014 (2003); *United States* v. *Taylor*, 196 F.3d 854, 861 (7th Cir. 1999), cert. denied, 529 U.S. 1081 (2000); *United States* v. *Bryant*, 726 F.2d 510, 511 (9th Cir. 1984).

Here, the court engaged in the appropriate ends-of-justice balancing before granting the continuance, but never made an express finding on the record because of petitioner's waiver. See pp. 19-21, *supra*. In such circumstances, if the Court were to conclude that waiver or estoppel principles did not apply, remand would be appropriate. As this Court has explained, "remedies should be tailored to the injury * * * and should not unnecessarily infringe on competing interests." *United*

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apply in other circumstances, including those in which it is less clear that the court would have entered an express ends-of-justice finding but for the waiver.

States v. *Morrison*, 449 U.S. 361, 364 (1981). Remanding for fact finding would be a narrow and targeted remedy that would address the absence of an express ends-of-justice finding while potentially avoiding the prejudice that the government and the public interest in crime prevention would otherwise suffer from petitioner's about-face. Cf. *Board of Tr. of the State Univ.* v. *Fox*, 492 U.S. 469, 476 (1989) ("[R]emand was correct, since further factual findings had to be made."); *Bowen* v. *Kendrick*, 487 U.S. 589, 620-621 (1988); *School Bd.* v. *Arline*, 480 U.S. 273, 288-289 (1987).[8]

II. A DEFENDANT CANNOT SHOW REVERSIBLE ERROR FROM THE FAILURE TO BEGIN TRIAL AT A TIME WHEN THE DEFENDANT WAS INCOMPETENT

The second period of challenged delay, from August 23, 2000, until March 7, 2001, did not violate the STA because petitioner was not competent to stand trial during that period. Because the Due Process Clause bars the trial of a mentally incompetent defendant, *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996), "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial" is excluded from the STA's 70-day clock. 18 U.S.C. 3161(h)(4). Although the court of appeals concluded that "any" violation during the challenged time period was harmless, J.A. 209, the court of appeals did not actually find any error, and there was none. Moreover, the only "argu[able]" error identified by the court of appeals was an alleged failure to make a more complete

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[8] To the extent that the error here were viewed as the absence of an express finding that the ends of justice justified the delay, that omission might also be considered harmless in the circumstances of this case. See pp. 35-41, *infra*.

record on the incompetency exclusion. J.A. 205. The court of appeals correctly held that any such "technical" error of that nature is subject to harmless-error analysis, and was harmless here. *Ibid*. At most, petitioner would be entitled to a remand for the district court to make findings on the effect of petitioner's incompetence on the challenged period of delay.[9]

A. The Period Between August 23, 2000, And March 7, 2001, Is Automatically Excluded From The Speedy Trial Act Clock Because Petitioner Was Not Competent To Stand Trial

1. Petitioner was incompetent to stand trial between August 2000 and March 2001. On July 10, 2000, the district court held a competency hearing at which Dr. Drob testified that petitioner had a "mental illness" and should be considered incompetent to stand trial if he persisted in the delusional belief that the bonds were genuine. C.A. App. 240, 242-243. The parties filed post-hearing briefs between August 4, 2000, and August 23, 2000, and the court found on March 21, 2001, that petitioner was not competent to stand trial. J.A. 128-136, 194-195. On interlocutory appeal, the court of appeals affirmed that finding. *United States* v. *Zedner*, 29 F. App'x 711 (2d Cir. 2002).

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[9] As an alternative ground for affirmance, the court of appeals also relied on defense counsel's unavailability. J.A. 204-205. The unavailability of defense counsel is an appropriate basis for an ends-of-justice continuance under 18 U.S.C. 3161(h)(8). See, *e.g.*, *United States* v. *Anello*, 765 F.2d 253, 258 (1st Cir.), cert. denied, 474 U.S. 996 (1985); *United States* v. *Nance*, 666 F.2d 353, 358 (9th Cir.), cert. denied, 456 U.S. 918 (1982). The district court did not, however, grant a continuance during the relevant time period. Thus, the government does not rely on that rationale.

The court's finding of incompetency necessarily encompassed the entire period between August 23, 2000, and March 7, 2001, because the finding was based on testimony, evidence, and argument presented *before* that period began. See J.A. 129-135. Thus, Section 3161(h)(4) excludes the entire period from the STA clock. Br. in Opp. 15-16.[10]

2. Petitioner argues (Pet. Br. 13-14, 39-40 n.17) that the incompetency exclusion does not apply because if the court had found him incompetent sooner, he would have been treated and tried sooner. That contention is legally irrelevant and unduly speculative.

Under the STA, the only question is whether delay "result[ed] from" petitioner's incompetency. 18 U.S.C. 3161(h)(1)(A). The delay between August 2000 and March 2001 resulted at least in part from petitioner's incompetency because he could not have been tried when he was incompetent. Whether petitioner might have been restored to competency sooner is irrelevant to that inquiry. See H.R. Rep. No. 1508, *supra*, at 33 (exclusion applies to "the period during which a defendant is incompetent to stand trial"); cf. S. Rep. No. 1021, *supra*, at 37-38 ("[T]he length of time required for [a defendant] to [return to competency] obviously should not be the basis of a speedy trial claim.").

The statutory context confirms that the STA does not invite inquiries into whether the court should have attempted to have petitioner's competency restored sooner. As this Court has explained, only one of the STA's exclusions is textually limited to a "reasonable

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[10] As the court of appeals noted, the first 30 days following the submission of briefing on petitioner's competency are also excluded under 18 U.S.C. 3161(h)(1)(J), which excludes up to 30 days during which a motion is under advisement. J.A. 204 n.4.

period of delay." *Henderson* v. *United States*, 476 U.S. 321, 327 (1986) (quoting 18 U.S.C. 3161(h)(7), which governs delay resulting from proceedings involving co-defendants). Apart from that exception, the STA's exclusions are generally "automatic" in that they "do[] not require that a period of delay be 'reasonable' to be excluded." *Id.* at 326-327 (citation omitted); accord, *e.g.*, *United States* v. *Vo*, 413 F.3d 1010, 1015 & n.2 (9th Cir.), cert. denied, 126 S. Ct. 785 (2005); *United States* v. *Vogl*, 374 F.3d 976, 985-986 & n.10 (10th Cir. 2004); *United States* v. *Vasquez*, 918 F.2d 329, 333 (2d Cir. 1990).

Thus, even if a defendant's return to competency were unreasonably delayed, the entire period of incompetency would still be automatically excluded under Section 3161(h)(4). *United States* v. *Triumph*, No. 3:02CR81, 2004 WL 1920352, at *3 (D. Conn. Aug. 24, 2004); *United States* v. *Degideo*, Crim. 04-100, 2004 WL 1240669, at *4 (E.D. Pa. May 18, 2004). The STA, in short, takes a defendant's incompetency as it finds it; the Act does not also regulate a defendant's return to competency, which is governed by other statutes, such as 18 U.S.C. 4241.

In any event, it is far from clear that an earlier competency determination would have led to an earlier trial, because too many other variables affect a defendant's competence and the scheduling of trial. Petitioner was certainly in no hurry. Although petitioner states (Pet. Br. 2) that in August 2000 he requested a trial as soon as possible, he then took an interlocutory appeal of the incompetency finding, which delayed his treatment for nearly a year, and after his challenges to receiving

treatment had failed he sought and received a 90-day extension of the time for treatment. J.A. 195-196.[11]

3. The court of appeals stated that "[t]he argument might be made that the court's failure either to make a record that the delay resulted from the defendant's incompetence or to start trial was at least potentially a technical violation of the Act." J.A. 205. Petitioner has not advanced that argument, and it is not meritorious. The record reveals that petitioner was incompetent during the time period in question, and no further information is needed to determine that the time is excluded under Section 3161(h)(4). See pp. 32-34, *supra*. While courts must make ends-of-justice findings to support continuances granted under Section 3161(h)(8), most of the Act's other exclusions, including Section 3161(h)(4), are automatic. See *Henderson*, 476 U.S. at 327; S. Rep. No. 212, *supra*, at 31, 33. Thus, they do not require supporting findings. *Sutter*, 340 F.3d at 1027; *United States* v. *Hohn*, 8 F.3d 1301, 1305 (8th Cir. 1993).

Nor does any background rule require district courts to support legal rulings with express findings. Although such findings can facilitate appellate review, they are not required where, as here, the record is adequate to permit such review. *Arizona* v. *Washington*, 434 U.S. 497, 516-517 (1978).

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[11] Because petitioner filed his motion to dismiss on March 7, 2001, and did not file any other motion based on subsequent time periods (see J.A. 177-178), he waived any challenge to delay occurring after March 7, 2001. See 18 U.S.C. 3162(a)(2) ("Failure of the defendant to move for dismissal * * * shall constitute a waiver of the right to dismissal."); *United States* v. *Wirsing*, 867 F.2d 1227, 1230 (9th Cir. 1989) ("[A] court need only consider alleged delay which occurs prior to and including the date on which the motion is made. The right to challenge any subsequent delay is waived absent the bringing of a new motion to dismiss.").

B. Any Error In Not Making A More Complete Record On The Incompetency Exclusion Was Harmless

The court of appeals correctly held that even if the district court had erred by not "mak[ing] a record that the delay resulted from the defendant's incompetence" (J.A. 205), such error was harmless. J.A. 205-209.

1. "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). Congress has likewise instructed appellate courts to "give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. 2111. That harmless error rule is "essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" *Arizona* v. *Fulminante*, 499 U.S. 279, 308 (1991) (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986)).

Even "most constitutional errors can be harmless." *Fulminante*, 499 U.S. at 306. Only a "limited class of fundamental constitutional errors" that "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence'" have been exempted from harmless-error review. *Neder* v. *United States*, 527 U.S. 1, 7, 8-9 (1999) (quoting *Rose* v. *Clark*, 478 U.S. 570, 577 (1986)).

This case involves a statutory as opposed to a constitutional right, and Congress has authority to displace the fundamental harmless-error principles that would

otherwise apply to such a right. See *Alabama* v. *Bozeman*, 533 U.S. 146 (2001); *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990). A partial repeal by implication of Rule 52 is, however, "a result sufficiently disfavored, as to require strong support." *United States* v. *Vonn*, 535 U.S. 55, 65 (2002). "Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254, 255 (1988).

2. At least with respect to the error alleged here, Congress has not manifested an intent to displace harmless-error review with sufficient clarity. Although petitioner argues (Pet. Br. 33) that "a violation of the 70-day time limit for bringing a defendant to trial is [not] subject to harmless-error analysis," that is not the potential violation identified by the court of appeals. Instead, the court of appeals stated that the district court's "failure *either* to make a record that the delay resulted from the defendant's incompetence *or* to start trial was at least potentially a technical violation of the Act." J.A. 205 (emphases added). Thus, although portions of the court of appeals' decision discuss harmlessness principles more broadly, see J.A. 207-208, the court correctly recognized that the specific question here is whether a "technical" failure to make a more complete record is subject to harmless-error analysis "when the court could not have begun trial because the defendant was incompetent." J.A. 205; see J.A. 208-209; Br. in Opp. 16.

Because any such technical error is not tantamount to a delay of the trial beyond the 70-day limit, petitioner's harmlessness arguments about violations of the 70-day period are beside the point. Petitioner emphasizes (Pet. Br. 33) that the Act provides that "[i]f

a defendant is not brought to trial within the [70-day] time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). The mandatory nature of that provision lends support to petitioner's argument (Pet. Br. 33-38) that violations of *the 70-day time limit* cannot be found harmless, see *Bozeman*, 533 U.S. at 153-154, but it does not address the question here.

Petitioner's arguments (Pet. Br. 38-42) on the structure and history of the Act are similarly misplaced because they focus only on the 70-day limit. As petitioner notes (*id.* at 38-39), this Court has held that "prejudice to the defendant" is relevant to the determination whether dismissal based on a violation of the 70-day limit should be with or without prejudice, *Taylor*, 487 U.S. at 334, and that conclusion arguably supports the contention that prejudice is not relevant to the threshold question whether to dismiss based on such a violation. The legislative history also suggests that Section 3162(a)(2)'s mandatory-dismissal provision was considered vital to Congress's effort to induce courts and litigants to comply with the Act's time limits. S. Rep. No. 1021, *supra*, at 16, 21-22, 42; cf. *Strunk* v. *United States*, 412 U.S. 434, 440 (1973) (holding that although prejudice is relevant to whether a constitutional speedy trial violation occurred, dismissal is the only possible remedy for such a violation). Although those factors lend weight to the argument that violations of the 70-day period require dismissal without regard to harmless-error principles, they do not speak to the distinct question whether a technical failure to place findings in the record, when the delay was excludable in any event, should be reviewed for harmlessness.

3. Because the Act is silent on that question, the normal presumption in favor of harmless-error review controls. See *Montalvo-Murillo*, 495 U.S. at 716 (holding that violation of the time limits of the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, was harmless, in part because "the Act is silent on the issue of a remedy for violations of its time limits").

The STA contains several remedial provisions, but none addresses the situation here. See 18 U.S.C. 3162(a)(1) (providing for dismissal if indictment is not filed within time limit of 18 U.S.C. 3161(b)); 18 U.S.C. 3162(a)(2) (providing for dismissal if defendant is not brought to trial within time limit of 18 U.S.C. 3161(c)); 18 U.S.C. 3162(b) (providing for sanctions when attorneys deliberately delay trial without justification); 18 U.S.C. 3161(d)(2) and (e) (specifying that Section 3162 sanctions apply to violations of time limits for trials held after dismissals, mistrials, and orders for new trials); 18 U.S.C. 3164(c) (providing for "automatic review by the court of the conditions of release" in the event of an unexcused violation of the 90-day limit for trying an incarcerated defendant).

That carefully crafted scheme confirms that each remedial provision is limited to the specific situation it addresses, and does not speak to the proper treatment of other errors. Thus, harmless-error review applies under Rule 52(a) and 28 U.S.C. 2111 to violations of STA provisions that are not covered by one of the Act's mandatory-dismissal requirements. See, *e.g.*, *United States* v. *Edwards*, 211 F.3d 1355, 1358 (11th Cir.) (holding harmless a violation of 18 U.S.C. 3161(c)(2), which requires that trial not begin until 30 days after defendant's initial appearance), cert. denied, 531 U.S. 911 (2000); *United States* v. *Stoner*, 799 F.2d 1253, 1257 (9th

Cir.) (Kennedy, J.) (holding dismissal was not required based on any violation of 18 U.S.C. 3161(j)(3), which addresses trials of prisoners who had been convicted and detained on other charges), cert. denied, 479 U.S. 1021 (1986).[12]

Applying harmless-error review here is consistent with Congress's intent to increase the pace of criminal trials in a *reasonable* manner, in part to prevent further crime by defendants awaiting trial. See, *e.g.*, H.R. Rep. No. 1508, *supra*, at 14-16. Permitting a defendant to escape justice because of a technical error in making a more complete record on the reasons for delay, when delay was justified in any event, would not serve those goals. Instead, it would encourage defendants to delay in hopes of receiving a windfall, which could free them to commit more crimes. Cf. *Montalvo-Murillo*, 495 U.S. at 720 ("The end of exacting compliance with the letter of [the Bail Reform Act] cannot justify the means of exposing the public to an increased likelihood of violent crime by persons on bail, an evil the statute aims to prevent.").[13]

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[12] Although petitioner contends (Pet. Br. 35 n.15) that "ten circuits have held that dismissal is mandatory," all of the cited cases involve alleged violations of the STA's time limits, not the type of technical error alleged here. See, *e.g.*, *United States* v. *Hastings*, 847 F.2d 920, 921 n.1 (1st Cir.), cert. denied, 488 U.S. 925 (1988). Nor does any of those cases consider the relevance of harmless-error principles. We have found only one published case in which a court of appeals considered and rejected the application of harmless-error analysis to a violation of the STA, and that case involved an alleged violation of the 70-day limit. See *United States* v. *Carey*, 746 F.2d 228, 230 (4th Cir. 1984), cert. denied, 470 U.S. 1029 (1985).

[13] In *Bozeman*, this Court held that violation of the IAD's prisoner-transfer rule requires dismissal because the IAD's mandatory-dismissal provision draws "no distinction" among prisoner transfers according to

4. In the circumstances of this case, the court of appeals correctly held that any error was harmless. The court of appeals explained both that petitioner could not have been tried during the time period in question and that petitioner had not demonstrated that any delay prejudiced his ability to defend the charges against him. J.A. 208-209. The first of those points is dispositive. Petitioner's incompetence both prevented him from being tried and excluded the relevant time period from the STA clock. Any "technical" failure by the district court to make a record that the delay resulted from petitioner's incompetence did not delay petitioner's trial. Accordingly, without regard to whether errors that delay a trial beyond the 70 days permitted by the Act can be harmless, the technical error here plainly was harmless.

5. Petitioner concludes (Pet. Br. 44) by asking this Court to vacate and remand for determination of whether the delay from August 2000 until March 2001 violated the Act. The government agrees that if there were any doubt about whether dismissal were required, the proper course would be to remand rather than to direct dismissal. It would make little sense for this Court to enter judgment in favor of a litigant based on

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their duration. 533 U.S. at 153-154. Here, however, the distinction is between substantive violations of the 70-day limit and technical failures to make a more complete record, and the Act's remedial provision applies only to the former category of errors. See pp. 36-37, *supra*.

Petitioner's reliance (Pet. Br. 33-35) on *Taylor* is also misplaced. That case involved a violation of the 70-day time limit, not a technical error. See 487 U.S. at 330. Moreover, the Court did not consider the applicability of harmless-error principles, and the parties agreed that dismissal was required and the only question before the Court was whether dismissal should be with or without prejudice. See Gov't Br. at 13-14, *Taylor*, *supra* (No. 87-573).

a district court's failure to set forth findings against him in the record. Instead, the appropriate course would be to remand to the court of appeals, which could remand to the district court for further record development and findings. See pp. 30-31, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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